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THE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE.

Under the general provisions of our State constitutions that "private property shall not be taken for public use without just compensation," it has long been settled that the legislature does not possess the power to authorize the taking of private property for any but a public use. *Taylor v. Porter*, 4 Hill 140; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54. The rare cases in which this rule has been questioned, as in *Harvey v. Thomas*, 10 Watts 63, are among the anomalies of our law. Nor, since the adoption of the Fourteenth Amendment, can a State, in the absence of any express or implied restriction in its constitution, take private property for a private use. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403. Public policy has demanded that in some cases the legislature should possess this power, and hence there have been inserted in the constitutions of several States provisions permitting private property to be taken for certain private uses, such as private ways, drains, flumes and ditches for agricultural, domestic or sanitary purposes. Obviously in such cases no question can arise as to the nature of the use. *Downing v. More*, 12 Colo. 316. But the validity of such constitutional provisions has within the past few years been challenged as being repugnant to the Fourteenth Amendment. *Matter of Tuthill*, 163 N. Y. 133.

Aside from peculiar provisions regarding the exercise of the power of eminent domain embodied in several of the State constitutions, the great point of divergence in the decision has been in conflicting interpretations of the term "public use." One of the most frequent illustrations of this has been in the construction of statutes providing for the condemnation of land for private roads. The subject has again been presented in the case of *Healy Lumber Co. v. Morris*, 74 Pac. 681, recently decided by the Supreme Court of Washington, in which the court holds unconstitutional a statute of that State authorizing the condemnation of land for private logging roads. In this case a sharp distinction is drawn between the terms "public use" and "public policy," and it is held that the use for which private property can be taken under the power of eminent domain "must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the State." The statute above referred to declared that the person condemning such right of way should have the exclusive use thereof, and the decision is believed to represent the better considered view. Cf. *Welton v. Dickson*, 38 Neb. 767. On the other hand, where it is provided that such roads shall be open to use by the public, such statutes have generally been sustained. *Sherman v. Buick*, 32 Cal. 253; *Denham v. Bristol County Commissioners*, 108 Mass. 202. The restricted meaning given to the term "public use" in *Healy Lumber Co. v. Morris*, *supra*, is the one approved by most text writers, and followed in a number of

the States, *Bloodgood v. Railroad Co.*, 18 Wend. 9, although in others it has been construed broadly as synonymous with public interest, benefit or advantage. Frequently the magnitude of the interests involved, as the mining industry in Montana, *Butte, etc., Ry. Co. v. Montana Farmers' Co.*, 16 Mont. 504, irrigation in Nebraska, *Paxton Co. v. Farmers' Co.*, 45 Neb. 884, manufacturing in Connecticut, *Olmstead v. Camp*, 33 Conn. 532, has been held to be a determining factor. On this point the decisions are in hopeless conflict.

The case of *Healy Lumber Co. v. Morris*, *supra*, has an additional element of interest in that it was decided under a constitution which permits private property to be taken for certain private uses, and declares that whenever the power of eminent domain is sought to be exercised the question of the public character of the use shall be a judicial question, to be determined as such regardless of legislative assertion. Among the private uses specified in the constitution for which private property may be taken is included "private ways of necessity," which the court holds—somewhat gratuitously—to be simply in affirmance of the common law rule that a private way of necessity can arise only out of land granted or reserved by the grantor. *Cf. Logan v. Stogsdale*, 123 Ind. 372. In the absence of a constitutional declaration that the public character of the use shall be primarily a judicial question, it is a general rule that the courts will construe the use to be public unless it is manifestly private. *Varner v. Martin*, 21 W. Va. 534; *Chicago, etc., Ry. Co. v. Morehouse*, 112 Wis. 1. The above provision in the constitution of Washington the court construes as having abolished the general rule and entirely removed the influence of any judgment expressed by the legislature.¹ A similar provision in the constitution of Missouri has been so interpreted; *City of Savannah v. Hancock*, 91 Mo. 54; but in the case of *Denver, etc., Co. v. Union Pacific Ry. Co.*, 34 Fed. 386, a like provision in the constitution of Colorado seems to be regarded as merely in affirmance of the general rule, and that notwithstanding a constitutional declaration that all railroads shall be deemed public highways, the question as to the character of a railroad may be raised in a proceeding by it to condemn land.

THE CONSTITUTIONALITY OF THE INITIATIVE AND REFERENDUM.

In June, 1902, the people of Oregon amended article four of their constitution to read as follows: "Section 1. The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people

¹In delivering the opinion of the court, Dunbar, J., states that "an examination of all the different constitutions in the Union shows that only two other States, viz: Colorado and Missouri, have this provision of our constitution." The learned judge apparently overlooked the constitution of Mississippi, which contains a similar provision. See Const. Miss., Sec. 17.